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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 200

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
Petitioners,

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents.*

No. 206

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner,*

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents.*

BRIEF IN OPPOSITION FOR BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

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BRIEF IN OPPOSITION FOR BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

Counterstatement of Question Presented

When for sixty years the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E") has bargained and contracted with the nation's railroads concerning training and promotion of locomotive firemen to locomotive engineers, may the BLF&E require carriers to bargain and mediate on an amendment it proposes to the provisions in its contracts governing training and promotion of firemen?

Counterstatement of the Case

Because the petitions do not adequately set forth the central facts, a page of history is required to put the present dispute in proper perspective. Viewed in the light of more than a half-century of fireman-engineer overlapping bargaining and agreement, it becomes clear that this case presents no "jurisdictional conflict" and no default by the National Mediation Board in the exercise of its statutory duties. All that is involved herein is a BLF&E bargaining notice on a subject—the training of firemen and their promotion to engineer—upon which the BLF&E has for many decades engaged in collective bargaining and reached agreements with the nation's carriers.

Genuine and effective bargaining in the railroad industry, which the Railway Labor Act is designed to encourage, repels any concept that a claim by another union, the Brotherhood of Locomotive Engineers ("BLE") of a one-union bargaining monopoly over the entire subject of entry into the ranks of the engineers could affect the BLF&E's historical rights to bargain on the subject of the training and promotion of firemen. That false predicate, upon which the petitions are squarely based, has properly been rejected by the Mediation Board and the Court below. The intervention by the District Court has already caused a three-year postponement of the speedy bargaining and mediation process which Congress clearly sought to safeguard from just such delay by judicial intrusion.

A. *The Dual Bargaining History of Apprentice Training*

Historically, there have been two men in the cab on our railroad system: the engineer at the throttle, the fireman (or "helper" as he is sometimes known) at his side. The almost inevitable work progression is from fireman to engineer (A. 130). The newly hired fireman is first assigned

to the "extra board", working as opportunities occur. With seniority, he acquires a regular "run", or a particular assignment. As he masters his trade through on-the-job training and home study and demonstrates a proficiency through spaced and increasingly difficult examinations, he qualifies as an engineer (A. 131). In time the senior qualified fireman is promoted to the ranks of the engineers without forfeiting his seniority as a fireman, and is usually assigned to the engineers' "extra list". Finally, he achieves sufficient seniority as an engineer for a regular assignment in that capacity (A. 132). Even then, however, because work opportunities fluctuate with seasonal, economic, and other conditions, the new engineer can expect to go back repeatedly to the fireman craft, "bumping" those with junior seniority (A. 131).

Since the turn of the Century the BLF&E has been concerned with the training and promotion of firemen to engineers (A. 137). It was concerned over the individual acts of favoritism which resulted in the promotion of one who enjoyed the favors of a petty official, while others with perhaps greater seniority were passed over (A. 272). It was concerned that examinations for promotion were sometimes held while senior firemen were dispatched to work assignments and thus precluded from eligibility for promotion (A. 273). To eliminate these practices and put promotion opportunities on the basis of seniority, as long ago as 1910 the BLF&E entered into agreement with fifty-one Western railroads. Then, in 1913, the BLF&E and the BLE signed what was known in the railroad industry as the Chicago Joint Agreement. This agreement detailed at some length the order and sequence in which firemen are examined for promotion to engineer and established the conditions under which demoted engineers return to service as firemen (A. 153). The 1913 Chicago Joint Agreement was promptly negotiated into both the BLF&E and the

BLE contracts with most of the Eastern and Southeastern railroads (A. 273).

Experience disclosed a loophole in the promotion rights of firemen. Many railroads hired "40 or 50% of their Engineers" from employees on other lines, "working an undue hardship on the Firemen on that particular road" (A. 274). Therefore the Chicago Joint Agreement was modified to impose a percentage limitation on the number of engineers that could be hired from other railroads (A. 281). As modified, in 1919 the Agreement was incorporated into all collective bargaining contracts of railroads then under Government control (A. 278). When Government control ceased with the end of World War I, the provisions of the Agreement were retained through the processes of individual collective bargaining (A. 142-151).[1]

Periodic bargaining has continued to the present time to keep training, examination, and promotion provisions in tune with changing conditions in the industry. In 1941, the BLF&E signed agreements with twenty-one railroads located in the Southeastern region of the United States which dealt in large part with the training, examination, and promotion of firemen (A. 139). In 1960, the BLF&E and the BLE *jointly* served a bargaining notice on the carriers proposing a four-year apprenticeship-type program to qualify firemen for promotion to engineer, with specified hours of off-the-job classroom training in addition to on-the-job training. During the first three years of the training program the trainees were to be known as "locomotive helpers", and during the fourth year as "apprentice engineers". At the end of the fourth year, those who passed qualifying examinations would be eligible to enter the craft or class of "engineer" (A. 140-141).

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[1] Although the Agreement was abrogated by the BLE in 1927, the seniority and promotion rules contained therein have continued to be negotiated into contracts of both the BLF&E and the BLE with the carriers (A. 191).

The training program joint notice was one of the issues considered by the Presidential Railroad Commission appointed in 1960 to review the fireman-manning dispute. While it found existing job requirements "not sufficient to justify such an extensive training program," the Commission did recommend that a training program for fireman promotion to engineer "be developed in subsequent discussion between the Carriers and the Organizations representing engine service employees. It should include some off-the-job instruction in the operation and functioning of diesel engine and other form of motor power" (A. 245).

B: *The BLF&E's 1965 Apprentice Training Proposal.*

Pursuant to Section 6 of the Railway Labor Act, in 1965 the BLF&E proposed a special training and upgrading program for firemen (A. 56). The notice was entitled "Standards of Apprenticeship for Locomotive Firemen." The text of the proposed Agreement expressly defined "apprentice" as referring to a fireman: "where the term 'apprentice' appears in this agreement, it is synonymous with the term 'fireman' as it appears in the current agreements" (A. 65).[2] H. E. Gilbert, President of the BLF&E subsequently represented to the NMB that the proposal of the BLF&E is

> ". . . a training program for locomotive firemen—a program for improving their skills in preparation for certain examinations to which they are to be subjected . . . Our training notice makes no reference what-

[2] The bargaining proposal, some ten typewritten pages in length, is typical of most apprenticeship programs. It contains a definition section; establishes a joint-management union system to administer the program; sets forth qualifications and a non-discriminatory process for selection; defines the wages, hours of work, safety requirements, the instruction to be received and subjects to be passed at spaced examinations; method for change; and techniques for resolving any dispute which may arise under the agreement.

ever to a training program other than one for locomotive firemen. Stated in another way, our notice relates solely to a training program for locomotive firemen—an area of subject matter wherein the BLF&E has represented without challenge, the craft of firemen since virtually the inception of collective bargaining on the railroads, as the files of the National Mediation Board disclose'' (A. 73-74).

The BLF&E's Section 6 notice initially was served in the Spring of 1965 on the Louisville & Nashville and the Southern Pacific (A. 79, 87), and on the nation's remaining carriers on November 15, 1965 (A. 56). Two days later the BLE warned all the carriers not to bargain with the BLF&E on its proposal (A. 17), asserting that only the union "designated as the bargaining representative of a craft has been considered as holding the bargaining rights for apprentices who are training to become skilled employees of that craft'' (A. 17). The BLE also advised the carriers that it had been negotiating for several months with Mr. J. E. Wolfe, Chairman of the National Railway Labor Conference, and that Mr. Wolfe recognized the BLE "as the bargaining agent for apprentice locomotive engineers and has stated a willingness to execute . . . an agreement with this organization covering the subject'' (A. 18). The carriers obliged by declining to bargain with the BLF&E on its apprentice training notices.

C. *Proceedings by the BLF&E Before the NMB*

When the carriers declined to bargain, the BLF&E applied to the Mediation Board for mediation assistance on its Section 6 notices. The carriers then filed a request with the National Mediation Board that it resolve what they called a "jurisdictional dispute'' between the BLF&E and

the BLE (A. 202). The National Mediation Board sought the views of the BLF&E and the BLE, and then followed replies (A. 207), further supporting statements (A. 73), rejoinders (A. 209), and the like.

Upon full investigation the Board found on June 21, 1966, that the bargaining notice of the BLF&E with respect to an apprentice training program for firemen was within the BLF&E's proper bargaining jurisdiction (A. 98) and scheduled mediation thereon. After recapitulating the position of the parties—noting particularly the BLF&E's representation that its proposed training program was for firemen only (A. 99)—the Board concluded:

> ". . . the above resume indicates that *neither the Brotherhood of Locomotive Engineers nor the Brotherhood of Locomotive Firemen and Enginemen is seeking to extend its jurisdiction beyond the scope of the craft or class of employees they presently represent* . . .
>
> "The question as posed involves a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act. The application [of the carriers] dated June 6, 1966 . . . is therefore dismissed" (A. 100-101; emphasis supplied).

Consistent with its ruling upholding the validity of the BLF&E bargaining notice, the Board scheduled mediation thereon between the Brotherhood and a number of the carriers for August 4, 1966, which would have proceeded but for the institution of the present action and the intervention of the District Court. The Board's ruling, we submit, was entirely correct and appropriate, for, as the Court below properly concludes, the "historical expectation of promotion to the job of engineer is a 'term or condition' of [firemen's] employment which their union may legitimately bargain to protect." The ruling below does

not invoke any grounds for grant of this Court's review.[3]

Reasons for Denying the Writ

1. *The Court Below Properly Upheld the BLF&E Bargaining Notice and Declined to Disturb the Board's Scheduled Mediation Thereon.*

There is no doubt that the BLF&E apprentice training proposal is a proper subject for bargaining.[4] Nor can there

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[3] In the above Counterstatement and the following analysis we focus on what the carriers concede to be seminal issue in this case—the bargainability of the BLF&E apprentice training notices. The separate and limited question concerning the apprentice engineers hired on the Louisville and Nashville Railroad, pursuant to an agreement between that Carrier and the BLE, is fully discussed in the Opposition of the National Mediation Board and the opinion below. We concur with the lower Court's conclusion that the L & N matter "deviated widely from the sort of dispute contemplated by Section 2, Ninth," where "within an existing group of employees some wish to be represented by one union and some by another, [and] the Board is to decide which union is 'the true representative'."

[4] The BLF&E proposal clearly relates to "rules and working conditions" as that term is defined in Section 2, First of the Railway Labor Act. Such proposals, and agreements based on these proposals, have become commonplace under the Railway Labor Act and the comparable definition of bargainable proposals in the National Labor Relations Act. Indeed, one of the most authoritative sources reports that:

> "Training clauses providing for self-improvement and advancement opportunities for regular employees are becoming more common as unions press for protection against automation and technological change." Bureau of National Affairs, *Collective Bargaining—Negotiation of Contracts*, ¶ 81-51.

Collective bargaining proposals run a wide gamut, reflecting efforts to meet the needs of employees under ever-changing conditions. Even a union's proposal that the employer give it a "veto power" over the abolition of jobs is "bargainable" under the Railway Labor Act. As emphasized by *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 338:

> ". . . in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that 'collective bargaining as to the length of term of employment is commonplace' is not challenged . . . The trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroad may or must negotiate and bargain collectively."

be any real doubt that the BLF&E is a proper party to bargain on this proposal? Since the turn of the Century the BLF&E has been concerned with and signed contracts relating to the training-promotion subject of the bargaining notice here under challenge: the 1910 promotion rule negotiated with 51 Western railroads (A. 273), the 1913 Chicago Joint Agreement between the BLF&E and the BLE, and the subsequent joint negotiation of training and promotion rights with the major railroads in the East and Southeastern portions of the United States (A. 273); the 1919 action of the Government inserting similar provisions on all railroads then under federal control (A. 278); the continuing negotiations with individual carriers (A. 142-151); the 1941 agreement with twenty-one railroads in the Southeast (A. 139); and the 1960 joint apprentice proposal of the BLE and the BLF&E (A. 140). All these serve to emphasize the recognition in the railroad industry of the rightful interest of the BLF&E in the training and promotion opportunities of its members.

It is on this long historical record of bargaining by the BLF&E concerning training of firemen and their promotion to engineer that the Board and the Court below rejected the present challenge to the BLF&E's 1965 apprentice training bargaining notice. Their rulings are surely correct, for there is nothing presented to overcome the presumptive bargaining interest of the firemen in conditions of training and promotion of firemen to engineer when it is considered that (1) firemen traditionally have been promoted to engineer and indeed this is one of the major emoluments of the craft, (2) the ebb and flow with changing work demands from fireman to engineer and back to fireman makes the subject of promotion one of particular and continuing concern, and (3) for half a century the intimate interest of the firemen has been recognized by all and reflected in carrier contracts signed with the BLF&E, stipulating conditions

of promotion to engineer.[5] The order of the Board that mediation should proceed on the BLF&E's legitimate apprentice training notice was thus quite proper. The refusal by the Court below to interfere with the scheduled mediation process is thus fully supported and raises no issue warranting review.

2. *No Question of Mediation Board Power to Resolve Union Jurisdictional Conflicts Is Presented, Because Training and Promotion to Engineer Is a Bargainable Subject For the Firemen's Union.*

All apart from the correctness of the ruling below, petitioners are simply mistaken in their assertion that this case presents a significant question concerning the power or duty of the National Mediation Board to resolve inter-union jurisdictional disputes. In a genuine case of jurisdictional conflict, representation of the same employee is claimed by competing unions or a given work task can fall within only a single union's bargaining authority. Neither of those situations is present in this case. There are no employees on any payroll being claimed for representation purposes by both BLF&E and BLE. Further, while the BLE as representative of engineers has a legitimate interest in the subject of entry into the craft, the BLF&E

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[5] The petitions imply that the BLF&E's traditional interest in conditions of promotion to engineer has somehow been eroded by Public Law Award 282, which authorized interim job eliminations causing major reduction in the ranks of the firemen. But there remain in service many thousands of working firemen, and carriers still continue hiring to comply with the 10 percent requirement in freight and yard service as well as the unchanged manning requirement applicable on passenger trains and in full crew states and further hiring will be required to man "new runs". *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, — U.S. App. *D.C.* —, 385 F. 2d 581, 611 (1967), *cert. den.*, 390 U.S. 923 (1968). For these working firemen guarantees of promotability to engineer have undiminished importance; indeed they have increased importance in view of the fact—graphically illustrated in the BLF&E's pending petition for certiorari in No. 180—that since expiration of Award 282 in 1966 carriers are generally refusing to honor the firemen's historic working rights.

represents the equally legitimate concern of firemen to assure training and promotion under conditions comparable to the system by which engineers have historically been recruited from the ranks of the firemen.

Thus petitioners' insistence that the National Mediation Board must resolve a "jurisdictional conflict" rests on the mistaken assumption that apprenticeship training for promotion of firemen to engineer is an "either/or" area wherein only one union can demand bargaining. In fact, there is no principle that only one union can have a sufficient interest in a particular aspect of a carrier's conditions of employment so as to require bargaining by the employer only with that union on those conditions, even though they may obviously and intimately affect more than one craft or class.[6] This is particularly true where the issue is of training or apprenticeship for promotion from one skill category to the next. There it is obvious that the union representing the employees from whose ranks the employer promotes or may promote to the more advanced work has a direct and intimate interest in the subject of training and promotability. Surely this is so in the present case where promotion to engineer has historically been the chief benefit of the firemen's trade.

Thus the short answer to the allegedly important issue posed by petitioners is that no such issue is presented. All that has so far occurred is that the BLF&E, which has for some 60 years negotiated agreements with carriers concerning the training of firemen for promotion to engineer, now seeks bargaining on amendments to its contracts on that subject. The BLE is seeking bargaining on appren-

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[6] Of course, if it should develop in the future that apprentice engineers are a separate class or craft, and a group of workers in the craft or class is actually employed on a carrier, only one union can be the bargaining representative of these workers. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548-549 (1937).

tice engineers. The only possible conflict is one that may arise if and when a carrier signs a contract with one union which the other claims to intrude upon its rights. But surely such a conflict is only resolvable after it actually arises, and cannot be pre-judged by the Board before it eventuates.

Indeed, in a bargaining area where more than a single union has a legitimate interest, to require the Board to uphold the bargaining authority of one and preclude that of the other would have most unfortunate consequences. The prevailing union would then effectively exercise the collective bargaining authority over the interests of employees represented by another. The carriers would thereby be put in a most awkward position, far worse than the bargaining dilemma which they claim will result from the ruling below. For if the bargaining interests of a craft of employees and their union were pre-empted by recognition of paramount and exclusive bargaining authority in another union, it would be difficult indeed for the employer to determine to what extent the union in its demands was genuinely speaking for the employees it does not ordinarily represent. In terms of the present case, if it could bargain with only one union, a carrier would find it equally difficult to determine whether the BLE was adequately representing the interests of the firemen as concerns promotion to engineer, or the BLF&E was adequately representing the interests of the engineers in contracting for terms of entry into their ranks. Single union bargaining in an area of shared concern reeks of conflict of interests, and underlines the historical wisdom of judicial restraint where the National Mediation Board is furthering collective-bargaining activity.

As concerns the general bargaining jurisdiction of the unions over apprentice training, the Mediation Board has resolved the only issue which is presently ripe, holding that

neither union's bargaining notice seeks "to extend its jurisdiction beyond the scope of the craft or class of employees they presently represent . . ." The Mediation Board has exercised what powers it has, and the alleged issue concerning the Board's duty to resolve "jurisdictional disputes" is simply not presented in this case.

3. *The Ruling Below Does Not Conflict With the Sixth Circuit's Decision in BLF&E* v. *Louisville & N.R. Co.*

Contrary to the claim of conflict between circuits, the basic issue here was not before the Sixth Circuit and both in the result which it reaches and the rationale upon which it rests the ruling below is consistent with *Brotherhood of Locomotive Firemen and Enginemen* v. *Louisville & N.R. Co.*, 400 F. 2d 572, *cert. den.*, 393 U.S. 1050. As concerns result, the Court below declined to inject itself into controversies appropriately resolvable by expert administrative agencies; similarly, the Sixth Circuit's decision also declined judicial relief.

Nor is there any conflict of rationale between the two decisions. In declining to exercise judicial jurisdiction, the Sixth Circuit noted that among disputes not resolvable by courts is a "representation or jurisdictional dispute between labor unions," over which Congress conferred "exclusive jurisdiction upon the National Mediation Board. . ." The most that can be said is that the Sixth Circuit was indicating NMB *power* of resolution should the BLF&E *assert* a claim to represent apprentices in the employ of the Louisville & Nashville. But the ruling below holds only that where the BLF&E has *not asserted* a claim to represent those apprentices, the Mediation Board had no *duty* to resolve any dispute on the L & N. The holdings are thus quite consistent.

The point is underscored by the Opposition of the Louis-

ville and Nashville, one of the petitioner-carriers here, filed in this Court to oppose review of the Sixth Circuit's opinion (No. 774, October Term, 1968) which stated in presently relevant terms (at p. 54):

> "The final outcome of this [District of Columbia] case does not affect the validity of the judgments below. In the case at bar the essential findings are: (1) that there is a jurisdictional dispute between BLF&E and BLE concerning which organization is empowered to negotiate in behalf of apprentice engineers, and (2) that the federal courts do not have jurisdiction to resolve such a jurisdictional dispute.
>
> "On the other hand, the Washington law suit goes two steps further, holding: (3) that the National Mediation Board has power to decide the dispute, and (4) that it should exercise that power and resolve the controversy. Whatever may be said about points 3 and 4, the law is and for many years has been crystal clear about points 1 and 2. Federal courts do not have jurisdiction to resolve disputes between a railroad labor union and a railroad growing out of an inter-union jurisdictional dispute."

The point thus pressed upon this Court by the carrier only a few months ago utterly repels its present claim of conflict in rulings.

Finally, the major thrust of the present case is not the status of the Louisville & Nashville apprentices, but whether some 180 other carriers throughout the nation who do not have apprentice engineers can decline to bargain over a BLF&E demand for a training and promotion program. That central issue here was in no way before the Sixth Circuit.

In sum, the two cases focus on a different subject, their

predicates are not inconsistent, and actually in both instances the Circuit Court declined to intrude upon the expert province of Railway Labor Act agencies. We show in the remainder of the discussion that such judicial abstention makes good practical sense and is wholly consistent with this Court's decisions.

4. *Refusal By the Court Below To Short-circuit the Statutory Bargaining and Mediation Process Makes Practical Sense And Comports With this Court's Repeated Reluctance To Intrude Upon the Mediation Board's Province.*

It has been a salutory doctrine applied by this Court's decisions ever since *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, to avoid review of the functioning of the National Mediation Board. The Court has repeatedly declined to intrude upon the Board's special province in mediation and jurisdictional dispute cases. See, e.g., *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U.S. 323; *General Committee* v. *Southern Pacific R. Co.,* 320 U.S. 338; *Brotherhood of Ry. & Steamship Clerks* v. *United Transport Service Employees,* 320 U.S. 715. In the Court below the rulings are legion declining judicial intrusion into Mediation Board controversies and this Court has repeatedly declined to disturb them.[7] Even in this Court's recent decision recognizing limited judicial jurisdiction to determine whether the Board has performed its duty of "investigation", in finding no statutory violation this Court emphasized that Congress indicated "high confidence" in the Board and kept its procedures and deter-

[7] See, e.g., *Kirkland* v. *Atlantic Coast Line R. Co.,* 83 App D.C. 205, 167 F. 2d 529, *cert. den.,* 335 U.S. 843; *UNA Chapter, Flight Eng. Ass'n.* v. *National Mediation Board,* 111 App. D.C. 121, 294 F. 2d 905, *cert den.* 368 U.S. 956; *Air Line Stewards and Stewardesses Association* v. *National Mediation Board,* 111 App. D.C. 126, 294 F. 2d 910, *cert. den.* 369 U.S. 810; *WES Chapter, Flight Eng. Int. Ass'n.* v. *National Mediation Board,* 114 App. D.C. 229, 314 F. 2d 234, *cert. den.,* 368 U.S. 953.

minations generally free from judicial review. *Railway Clerks* v. *Employees Association*, 380 U.S. 650, 668-69.

The instant decision is a particularly appropriate application of the judicial abstention norm, for in permitting mediation to proceed on the BLF&E's bargaining notice the Court was promoting a strong Congressional policy and reached a result which makes good practical sense. In the statute Congress put paramount emphasis on voluntary bargaining and mediation, and industrial experience shows how frequently "jurisdictional conflict" is successfully resolved at the bargaining table. That indeed was the situation in two of the landmark cases decided by this Court in 1943. In the *Missouri-Kansas-Texas* case, the BLF&E and the BLE each asserted a right to bargain concerning "emergency engineers". In the *Southern Pacific* case, the BLF&E and the BLE each asserted a right to represent engineers in grievance procedures arising under a Carrier-BLE contract. When the carriers ultimately engaged in free collective bargaining, they signed satisfactory agreements resolving the issues.[8]

The efficacy of collective bargaining as a means of settling

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[8] A like result has obtained in lower court cases. In *Order of Railway Conductors* v. *National Mediation Board*, 79 App. D.C. 1, 141 F. 2d 366 (1944), the Pennsylvania R. Co. was presented with conflicting demands by the Conductors and the Trainmen's unions concerning the conductors' "extra board". The Carrier negotiated and signed a contract with the Trainmen. In *In re Chicago North Shore & M.R. Co.*, 147 F. 2d 723 (7th Cir. 1945), *cert. den.*, 325 U.S. 852 (1945), the railroad was presented by conflicting demands by the Amalgamated and by the BLF&E. The Carrier assigned the work on a geographical basis after negotiating with both unions. In *Rolfes* v. *Dwellingham*, 198 F. 2d 591 (8th Cir. 1952), the Carrier was presented with conflicting demands for job opportunities by the "waiters-in-charge" and by the Dining Car Stewards. The Carrier awarded the work to the Stewards. In *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226 (3rd Cir. 1955), the Carrier was presented with rival contractual demands by a national organization and by a local union of that organization. The Carrier recognized and signed a contract with the local. In *Order of Railway Conductors & Break.* v. *Switchmen's Union*, 269 F. 2d 726 (5th Cir. 1959), the Central of Georgia was presented with conflicting demands by the two unions concerning "yard work" by

conflicting or potentially conflicting demands by rival unions is also graphically illustrated by the variety of resolutions achieved in the airline industry "cockpit consist" dispute. At one time the crew complement consisted of four men, three pilots and a flight engineer. The airlines then decided, with Government permission, to reduce the crew to three. The Flight Engineers immediately demanded that the third man be a qualified engineer, while the Air Line Pilots Association demanded that the third man be qualified as a pilot.

On United, the pilots resolved the jurisdictional dispute by petitioning under Section 2, Ninth for a new craft or class consisting of both pilots and engineers and outvoting the engineers in a representation proceeding. *UNA Chapter, Flight Eng. Ass'n.* v. *National Mediation Board,* 111 App. D.C. 121, 294 F. 2d 905 (1961), *cert. den.,* 368 U.S. 956 (1962). On American, the Carrier settled by giving a break-away local of the pilots a pay raise in exchange for the third-man position going to the engineers. *Ruby* v. *American Airlines, Inc.,* 323 F. 2d 248 (2d Cir. 1963). On Eastern, the Carrier bargained with the pilots to give engineer training to a new class of "pilot engineers". *Flight Engineers' Inter. Ass'n.* v. *Eastern Air Lines, Inc.,* 311 F. 2d 745 (2nd Cir. 1963). On Pan American, the Carrier bargained with the Flight Engineers to an impasse and the Flight Engineers went on strike. The union demand "to secure recognition of its claim to represent a separate craft or class" was held "on its face to be an entirely proper subject for collective bargaining and one on which either of the parties might lawfully insist." *Pan American World Airways* v. *Flight Eng. Intern.*

"road employees". The Carrier signed an agreement with the Switchmen. See also *Division No. 14, Order of Railroad Tel.* v. *Leighty,* 298 F. 2d 17 (4th Cir. 1962); *Brotherhood of Railway & S.S. Clerks* v. *United Air Lines,* 325 F. 2d 576 (6th Cir. 1963); *Southern Pacific Co.* v. *Switchmen's Union of North America,* 356 F. 2d 332 (9th Cir. 1965); and *Howard* v. *St. Louis-San Francisco Railway Company,* 361 F. 2d 905 (8th Cir. 1966).

Assoc., 306 F. 2d 840, 849 (2nd Cir. 1962). On Western Airlines, the Flight Engineers also went on strike. They were replaced with a new group, which promptly repudiated the Flight Engineers by voting for representation by a newly created union. *WES Chapter, Flight Eng. Int. Ass'n.* v. *National Mediation Board,* 114 App. D.C. 229, 314 F. 2d 234 (1962), *cert. denied,* 368 U.S. 953 (1962).

Whichever may be deemed preferable of these varying results, they do demonstrate that the presentation of conflicting demands by rival unions does not paralyze an employer. There is no inescapable dilemma. In the "cockpit consist" confrontation, the Carriers faced up to the conflicting union demands at the bargaining table, and things were worked out. So here, had suit not been filed by the BLE and had the Carriers negotiated with the BL&E at the NMB mediation session scheduled for August 4, 1966, the matter at issue might long since have been resolved in one of the several ways suggested in the opinion below, or in some other workable fashion.

Conclusion

It is respectfully submitted that the petitions should be denied.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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No. 288

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
PETITIONER

v.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 200

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

No. 206

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. in No. 200, pp. 1-19) is reported at 410 F.2d 1025.

The findings of fact, conclusions of law, and judgment of the district court (Pet. App. in No. 200, pp. 21-37) are reported at 284 F. Supp. 344.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1969. The petitions for writs of certiorari were filed on June 5, 1969, and June 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 2, Ninth, of the Railway Labor Act requires the National Mediation Board to investigate disputes "among a carrier's employees as to who are the representatives of such employees * * *" and to certify the representatives of employees. The questions presented are:

1. Whether Section 2, Ninth, requires the Board to determine who will be the representative of future employees who may be hired under a program which has been proposed but not yet adopted.

2. Whether Section 2, Ninth, requires the Board to determine what craft or class certain employees belong in when there is no dispute as to who represents the employees.

3. Whether the carriers were justified in refusing to bargain over proposals made by the Brotherhood of Locomotive Firemen and Enginemen relating to promotion and training of engine service employees.

STATEMENT

This action was brought by the petitioner in No. 206, the Brotherhood of Locomotive Engineers (the "Engineers"), against the National Mediation Board, the Brotherhood of Locomotive Firemen and Enginemen (the "Firemen"), and six railroads.[1] The principal relief sought by the Engineers and carrier defendants, and granted by the district court, was an order compelling the National Mediation Board, acting under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. 152, Ninth), to resolve a dispute between the Engineers and the Firemen concerning their respective rights to bargain with the carriers in the development and operation of training programs for locomotive engineers.

In August 1963, in order to prevent a national railroad strike, Congress enacted Public Law 88-108, 77 Stat. 132, which provided for a two-year period of compulsory arbitration of the protracted dispute over the reduction of the number of firemen serving on railroads.[2] The Arbitration Board convened pursuant to P.L. 88-108, known as Board 282, issued a ruling which permitted the nation's 200 carriers to eliminate up to 90 percent of the firemen's positions on freight trains, with procedures for the protection

[1] The Louisville & Nashville, Southern Pacific, Great Northern, Illinois Central, Atlantic Coast Line, and St. Louis Southwestern. The carriers are nominal defendants, who support the position of the Engineers.

[2] The history of the dispute is set forth in *Brotherhood of R. Trainmen* v. *Akron & Barberton B. R. Co.*, 385 F. 2d 581, 588-592 (C.A.D.C.), certiorari denied, 390 U.S. 923.

of existing employees. Since locomotive engineers traditionally have been promoted from the ranks of firemen,[3] the elimination of approximately 18,000 firemen's jobs under the Award[4] has caused the industry to consider alternative methods of assuring a continued supply of trained engineers.

In 1965 the Firemen served notices on the carriers, under Section 6 of the Act,[5] proposing the establishment of a three-year apprenticeship program (J.A. 56, 60-61).[6] The term "Apprentice" was defined both as "a person who is engaged in learning the craft of locomotive Enginemen", and as "synonymous with the term 'firemen.'" (J.A. 56.) During the course of the proposed program, apprentices were to "perform all duties commonly referred to as

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[3] Report of the Presidential Railroad Commission (1962), p. 45: "Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations."

[4] See *Akron & Barberton, supra,* n. 2, 385 F. 2d at 610 n. 1.

[5] 45 U.S.C. 156, Pet. App. No. 200, pp. 48-49.

[6] "J.A." refers to the Joint Appendix in the court of appeals. In 1960, the Engineers, Firemen, and other operating unions had jointly served notices on the carriers pursuant to Section 6 proposing the establishment of a four-year apprenticeship program for engine service employees, who were to be known as "locomotive helpers" for the first three years and as "apprentice engineers" for the fourth year (J.A. 140-141). This joint notice—which was consistent with a long-established bargaining pattern, in which the training, seniority, and promotion of engine service employees were covered by identical provisions in the carriers' collective agreements with both the Engineers and Firemen—was overtaken by the mounting controversy which led to the enactment of P.L. 88-108. See J.A. 137-152, 190-191, 237-244, 256.

Locomotive Firemen duties" (J.A. 69) and, upon satisfactory completion of the program, to receive a seniority date as locomotive engineer (J.A. 65).

The Engineers objected to the Firemen's proposals, claiming that they infringed upon its jurisdiction as representative of the craft of engineers. The Engineers offered its own proposals for a much shorter training program to be established by agreement between it and the carriers, claiming that a lengthy apprenticeship is unnecessary for training an engineer (J.A. 196).

Fearing a strike by the Engineers, the carriers then refused to bargain with the Firemen. Two of the carriers, the Louisville and Nashville and Great Northern, also unilaterally negotiated agreements with the Engineers. The only term of employment fixed by the L&N agreement (J.A. 25) is wages; all other terms are left solely to management discretion.

When the L&N and Southern Pacific railroads refused to negotiate with the Firemen over its notices, the Firemen invoked the mediation services of the National Mediation Board under Section 5, First, of the Act (45 U.S.C. 155, First). The Board docketed the case and scheduled mediation for August 4, 1966 (J.A. 121-122).

On July 1, 1966, the Engineers applied to the Board for a determination under Section 2, Ninth (45 U.S.C. 152, Ninth), of which union would represent new apprentices on the L&N. On July 22, 1966, after receiving the views of the carrier and both unions, the Board dismissed the Engineers' application on the ground that there had not been shown

to exist a dispute falling within the purview of Section 2, Ninth (J.A. 26-29). In response to a subsequent request of the carriers and Engineers that mediation be recessed or that the Board reconsider its dismissal of the Engineer's application, the Board stated the "Mediation sessions * * * will be held as scheduled" (J.A. 221-228).[7]

On August 4, 1966, the Engineers filed its complaint in the present case. As noted above, the district court granted the principal relief requested, compelling the Board to investigate the dispute under Section 2, Ninth, and to certify which union is the representative of apprentices training to be engineers on the L&N and Southern Pacific (Pet. App. No. 200, p. 34). The district court relieved the carriers of any duty "to confer, participate in mediation, or otherwise bargain with respect to the apprentice notices served upon them" by the Firemen, "unless and until the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant" (Pet. App. No. 200, p. 36).

The court of appeals reversed, sustaining the position of the National Mediation Board that it lacked jurisdiction over the controversy under Section 2,

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[7] The August 4, 1966, sessions were held; however, the discussion apparently centered entirely upon the interunion dispute (J.A. 254). As the result of the present litigation, no further mediation sessions have taken place.

Ninth of the Act, and ruling that the carriers were required to bargain with the Firemen (Pet. App. No. 200, pp. 1-19).

ARGUMENT

1. The court below correctly held that the present dispute is not within the jurisdiction of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act.

Section 2, Ninth, of the Railway Labor Act grants the National Mediation Board authority to resolve disputes "among a carrier's employees as to who are the representatives of such employees * * *." In the present case, however, there is no dispute even among the two unions and the carriers as to which union represents any existing employees. With respect to the L&N, the only carrier on which "apprentices" actually had been hired at the relevant times, the Firemen's Union does not contest the Engineers' representation of those employees.[8] More importantly, for the purpose of testing the Board's jurisdiction, there certainly is no dispute in this case "among a carrier's employees." As the Board has held for more than 30 years, with the approval of the District of Columbia Circuit, *Brotherhood of R. Trainmen* v. *National Mediation Board*, 135 F. 2d 780, 782-784 (C.A.D.C.), jurisdiction under Section 2, Ninth, must

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[8] The legislative history of the Act strongly supports the Board's position that it is not required to make craft or class determinations unless there is a dispute concerning who represents actual, existing employees. See Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934), p. 56.

be premised on a representation dispute among individual employees and does not reach all jurisdictional disputes between unions. This requirement that there be a dispute among actual employees is recognized in the Board's regulations requiring applicants invoking its jurisdiction under Section 2, Ninth, to submit authorization cards from a certain percentage of employees. See 29 C.F.R. 1203.2; 29 C.F.R. 1206.2-.5.

The relief which petitioners in effect sought from the Board was not the resolution of a dispute among existing employees as to who are their representatives within the meaning of Section 2, Ninth, but an advance determination of the craft or class which will include future employees who may be hired as "apprentices" under some program which may be adopted in the future; no such employees had been hired on five of the six petitioning carriers at the time of the district court's decision. Section 2, Ninth, does not impose such a duty on the Board. The two unions have proposed substantially differing programs for the training of engine service employees, see pp. 4-5, *supra*, and the statute leaves the settlement of substantive terms of employment to private parties without compulsory arbitration. The Board therefore could not properly undertake to make a craft or class determination prior to the establishment of the program.[9] As the court below stated (Pet. App. No.

[9] The carriers claim (Pet. No. 200, p. 22) that "the NMB has settled jurisdictional disputes by drawing craft lines in situations indistinguishable from the case at bar." But none of the Board rulings relied upon for that proposition involved

200, p. 15):

> When the Board makes a craft or class determination concerning a group of employees, it does so partly on the basis of the kind of work those employees are doing. If their work looks more like the work traditionally done by firemen, that cuts in favor of certifying them as firemen; if it looks more like engineers' work, the Engineers' union is more likely to be certified as the representative.
>
> Here, the Board could not yet know the nature of what work, if any, the apprentices would be doing. * * *

Although petitioners contend that the decision below puts the carriers in a "dilemma" as to which union they are required to bargain with, the carriers here are not merely neutral parties caught between two quarreling unions. They are instead interested in the substantive terms of employment, and quite naturally seek to deal with the union which offers the training program most acceptable to them. To the extent that the carriers' position is difficult, that difficulty does not result from a misinterpreta-

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a situation like the present one, where the Board is asked either to determine 1) the craft into which non-existent future employees will fall, or 2) into which craft employees fall, when *no one* challenges an existing representative of those employees (here the L & N apprentices). The carriers' reliance (Pet. 19) on *Northwest Airlines, Inc.*, 2 NMB 19, 23 is misplaced. There the Board held that a carrier could not prevent employees from gaining an initial certification for their chosen representative by claiming that they were not in dispute among themselves. The result was plainly dictated by Section 2, Fourth, of the Act (45 U.S.C. 152, Fourth), which is of no assistance to the carriers here.

tion of the Act by the court below or the Board, but from the long history of involvement of two separate unions in the training, seniority and promotion of engine service employees. Moreover, it is a difficulty which is not incapable of resolution through the bargaining and mediation procedures which Congress evidently contemplated; as noted above (note 6, *supra*), at one time the two unions jointly proposed a mutually agreeable apprentice program.

The consequence of petitioners' position, on the other hand, would be that either firemen or engineers would be deprived of a voice in a matter which has a substantial effect on their livelihood. As the court below pointed out (Pet. App. No. 200, p. 11), the Firemen's proposals "can certainly be seen as economic protection for firemen not yet on the engineer seniority list. It would delay the infusion of new engineer recruits into those lists for three years, thus allowing present firemen a first crack at available engineer jobs." To deny the representatives of firemen an opportunity to try to negotiate a program for their training and promotion is entirely inconsistent with the purposes of the Railway Labor Act, and could place firemen in a "dilemma" in which they lose promotional opportunities without a chance at collective bargaining.

2. There is no conflict of decisions.

Contrary to petitioners' contentions, the decision below is not in conflict with any other appellate ruling. In none of the cases relied on by petitioners was the National Mediation Board a party; the cases con-

sequently could not have held that the Board was required to resolve the interunion disputes there involved. For example, *Brotherhood of Locomotive Fire & E.* v. *Louisville & N. R. Co.*, 400 F. 2d 572 (C.A. 6), certiorari denied, 393 U.S. 1050, held merely that the court could not make a craft determination, and hence could not enjoin the carriers' agreement with the engineers on the theory that it invaded the Firemen's jurisdiction. That ruling but follows the holding of this Court in *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323.

Southern Pacific Co. v. *Switchmen's Union of North America*, 356 F. 2d 332 (C.A. 9), is similarly distinguishable. There the court held that a carrier could refuse to bargain with a union over a proposal which would involve an area from which the union had been excluded by its own agreement, and that only the Board could change the craft lines. The Ninth Circuit did not delimit the circumstances in which the Board might be required to make a craft or class determination—the main issue here—but merely held that only the Board could take such action. It does not follow that because an interunion controversy may not be adjudicated by the courts, it is one which the Board is required to settle under Section 2, Ninth. Indeed, in *General Committee*, *supra*, this Court, while stating that Section 2, Ninth, was designed "to resolve a wide range of jurisdictional disputes," also recognized that some interunion disputes have been "left to those voluntary processes whose use Congress had long encouraged" and that there may be "many areas in this field where neither

the administrative nor the judicial function can be utilized;" this "is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration." 320 U.S. at 336-337.

3. The court below correctly held that the carriers were required to bargain over the Firemen's proposals.

The premise of petitioners' position, in essence, is that a carrier can never be required to bargain with two unions over similar subject matter, notwithstanding past bargaining practices and the unmistakable interest of the unions and their members. The Board, on the basis of its lengthy experience with bargaining practices in this industry, rejected that view and advised the carriers that the proposals of both the Engineers and Firemen appeared to be proper (J.A. 100). Promotion, seniority, and training of engine service employees have long been the subject of bargaining with *both* unions—often resulting in identical contract provisions (J.A. 137-152, 190-191, 237-244, 256). In 1960, the unions jointly proposed an apprenticeship program, without objection that the joint proposal was inappropriate or that the firemen should be removed from the negotiations. Yet the district court's ruling which petitioners seek to reinstate would require the Board to eliminate the possibility of a settlement along the lines which both unions originally proposed.

It hardly can be contended, moreover, that the firemen lack a sufficient interest in the subject matter to require the carriers to bargain with them. Even under the Engineers' program, the apprentices obtain

seniority as firemen, and as railroad officials admitted, some are actually working as firemen upon completion of the program (J.A. 135, 137, 306, 321).[10]

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[10] The carrier's reliance (Pet. No. 200, 27-28) upon two decisions of the Court of Appeals for the Second Circuit involving a dispute over the reduction of the number of crew members in the cockpit of jet airplanes from four to three is misplaced. Prior to such reduction, there had been three pilots and a flight engineer, represented by different unions (the pilots association and the flight engineers); the basic dispute was whether the third man would be a pilot or a flight engineer, and which union would represent him.

Neither of those cases involved the question here presented of whether a carrier may be required to bargain with two unions. *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, certiorari denied, 376 U.S. 913, involved a dispute among the pilots as to who was their representative; the court held that it was for the Board to make that decision, and it therefore could not enjoin the carrier from dealing with a new representative of pilots whom "the overwhelming majority of pilots have authorized * * * to act as their bargaining representative," although the Board had not certified it (323 F. 2d at 253). *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924, involved events after negotiations between the carrier and both unions had run the full course of the statutory bargaining process (see 311 F. 2d at 746). After the carrier had bargained in good faith with the flight engineers and the latter had called a strike, the carrier used self-help as the Act permits (*Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238), replaced strikers and established terms of employment that were satisfactory to the other union. See *Flight Engineers Int. Ass'n, Eal Chap.* v. *Eastern Air Lines, Inc.*, 359 F. 2d 303, 308-309 (C.A. 2).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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